



U.S. DEPARTMENT OF JUSTICE

Antitrust Division

STATEMENT OF

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**BEFORE THE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**

**CONCERNING
H.R. 2674, "THE INTELLECTUAL PROPERTY
ANTITRUST PROTECTION ACT OF 1995"**

PRESENTED ON

MAY 14, 1996

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am very pleased to be here today to present the views of the Department of Justice on H.R. 2674, the Intellectual Property Antitrust Protection Act of 1995. As it did in connection with nearly identical legislation that was before this Committee in 1989, the Department endorses the substance of the bill. At the same time, however, we are reluctant to endorse generally the practice of amending the antitrust laws, whose broad mandate for an economy fueled by competition has served our nation so well for over a century. In our view, modification of the application of the antitrust laws should occur only when there is a substantial and compelling justification in favor of the change. As my testimony will address, we question whether that justification has been met in this instance.

BACKGROUND

As Commissioner Lehman points out in his testimony, the antitrust laws and the laws protecting intellectual property share the common purpose of promoting innovation and enhancing consumer welfare. The antitrust laws serve these ends by prohibiting certain actions that may harm competition with respect to existing or new ways of serving consumers. The intellectual property laws provide incentives for innovation by protecting in certain circumstances the innovation from imitation or copying, leading to more innovation which enhances consumer welfare.¹

¹ "The patent system, which is rooted in the United States Constitution (Art. I, § 8, cl. 8), serves a very positive function in our system of competition, i.e., 'the encouragement of
(continued...)

In our free-market economy, the amount that a firm invests in innovation may depend upon the perceived rewards from its investment -- typically, the higher the perceived rewards, the greater the investment. Conversely, if creators of new technologies expect diminished rewards due to uncompensated use of their creations by others, their incentives to innovate will be lessened. Consequently, fewer technological advances by American firms may occur, American competitiveness may suffer, and consumers may face fewer choices and higher prices. By restricting unauthorized use of inventions and copying of original works of authorship, our intellectual property system helps guarantee that inventors and authors receive a return on their efforts, promoting innovation, and giving consumers and firms access to inventions and creative works that otherwise may never have been produced.

At the same time, just as with other forms of property, some uses of intellectual property can result in less, not more competition that drives innovation; fewer, not more, products; and higher, not lower, prices. While intellectual property generally has not been harshly treated under the antitrust laws, it is beyond question that, just like the owner of other forms of property, the holder of an intellectual property right can violate the antitrust laws through particular conduct related to the intellectual

¹(...continued)

investment based on risk.' By so doing, it 'encourages innovation and its fruits: new jobs and new industries, new consumer goods and trade benefits.' In that sense, therefore, and because the underlying goal of the antitrust laws is to promote competition, the patent and antitrust laws are complementary." Loctite Corp. v. Ultraseal Corp., 781 F.2d 861 (Fed. Cir. 1985) (citations omitted).

property right.²

Typically, one of the most important factors in determining whether a civil antitrust law violation has occurred is whether the firm engaging in particular conduct has market power in a relevant antitrust market. Market power is the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time. A question that can arise with respect to a particular product that is the subject of an intellectual property right is whether that right, whether it be a patent, copyright, or trade secret, confers market power upon its owner.

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Section 2 of the bill would provide that, in any antitrust action against an owner, licensor, licensee, or other holder of a patent or copyright, concerning the intellectual property right owner's "marketing or distribution of a product or service protected by such a right,"³ no presumption of market definition, establishment of market power

² See, e.g., *United States v. Pilkington plc & Pilkington Holdings Inc.*, No 94-345 (D. Ariz. 1994) (exclusive territorial licenses based on expired patents used as mechanism for horizontal territorial allocation); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952) (patent pool used as price-fixing mechanism).

³ Although this language would seem to limit the bill's prohibition to actions involving transactions in the protected downstream products or services, the legislative history of one of H.R. 2674's predecessors, the Intellectual Property Antitrust Protection Act of 1989, indicates that it is also meant to apply to licensing transactions as well, as where a patent owner licenses another person to make products protected by the patent. S. Rep. No. 8, 101st Cong., 1st Sess. 13 (1989) ("The reference [in S.270,] to antitrust actions challenging conduct 'in connection with the marketing or distribution of a product or service protected by such a right' is intended to apply to any antitrust action challenging the legality of the defendant's conduct involving the marketing or distribution of an intellectual property right.")

(including economic power and product uniqueness or distinctiveness, attributes which at times have been held to be signs of market power) or of monopoly power may be drawn from the mere existence of the patent or copyright. The rule that this bill sets forth is an accurate statement of how intellectual property rights should be analyzed under the antitrust laws. While intellectual property rights, just like other forms of property rights, may well be relevant to the existence of market power or monopoly power, or to market definition, they must be viewed in the context of surrounding market facts, especially the presence of alternatives to the technology, expression, or goods protected by the intellectual property rights.

So strong is the consensus on this point, though, that it raises the question as to whether this bill is really necessary. I will return to this point and a related concern in a few moments. First, though, I would like to focus on the substance of the bill and the Department's strong agreement with it.

As you suggested in your statement of last November 20 introducing this legislation, Mr. Chairman, the question of intellectual property rights and market power frequently comes up in the context of a tying case -- where a seller conditions the sale or license of one thing (the tying product or service) on the sale or license of another (the tied product or service). While tying is categorized as a per se Sherman Act offense, it requires a showing of market power in the market for the tying good or service -- unlike other per se offenses such as price fixing and horizontal territorial allocations.

As you pointed out, Mr. Chairman, some of the more venerable tying cases held that "[t]he requisite economic power is presumed when the tying product is patented or copyrighted."⁴ Two classic examples, United States v. Paramount Pictures, Inc.,⁵ and United States v. Loew's,⁶ involve the long-condemned practice of "block booking," the tying of one or more undesirable movies to hit films. In Paramount, the tying was directed at movie theaters; by the time of Loew's, television had become an attractive target for tying bad movies to good.

Maybe there was in fact some degree of market power at work in these cases. For example, as the Court mused in a footnote in Loew's, the film distributors' ability to foist undesirable films on unwilling television stations may have stemmed from "the fact that to television as well as motion picture viewers there is but one 'Gone With the Wind.'"⁷ Had the Court relied on that point, Loew's would be a far more compelling -- but much narrower -- case, in which the market power finding was premised on the actual attributes of a tying product. Instead, though, the Court presumed market power from the very existence of the copyright, which vested no more power in in "Gone With the Wind" than it did in "Getting Gertie's Garter," one of the tied movies. But if that were what mattered,

⁴ United States v. Loew's, Inc., 371 U.S. 44, 45 (1962), citing International Salt Co. v. United States, 332 U.S. 392 (1947); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

⁵ 334 U.S. 131 (1948).

⁶ 371 U.S. 44 (1962).

⁷ Loew's, 371 U.S. at 48 n.6.

the movie studios would not have needed to tie in the first place -- market power would exist for every copyrighted movie. This is one of the clearest examples of why it is wrong to infer market power from the mere existence of an intellectual property right.

The Supreme Court cited this rule most recently in dictum in Jefferson Parish Hospital District No. 2 v. Hyde,⁸ a tying case that did not even involve intellectual property. In the very same case, though, Justice O'Connor (in an opinion for four Justices) sounded the rule's death knell in her concurrence, noting that "a patent holder has no market power in any relevant sense if there are close substitutes for the patented product."⁹ Since then, with the exception of the Ninth Circuit's decision a few months later in Digidyne Corp. v. Data General Corp.,¹⁰ the rule has faded into well-deserved obscurity.

In Digidyne, the Court of Appeals held that Data General's copyright in its operating system created a presumption of economic power sufficient to make it liable for tying sales of its central processing units to sales of the operating system -- thus keeping the operating system out of the hands of original equipment manufacturers that wished to use it in conjunction with another maker's CPU. There appeared to be evidence

⁸ 466 U.S. 2, 16 (1984) (reversing Fifth Circuit's holding that exclusive agreement between hospital and anesthesiologists' group amounted to tying violation in absence of evidence of hospital's market power or of "actual adverse effect on competition" warranting condemnation under Rule of Reason).

⁹ Jefferson Parish, 466 U.S. at 37 n.7 (O'Connor, J., concurring in the judgment).

¹⁰ 734 F.2d 1336 (9th Cir. 1984).

that, once an original equipment manufacturer had committed to making computer systems using Data General's operating system and CPU, and developed customized applications software at great cost, Data General had it over a barrel. And certainly Data General's copyright protection played a role in this. But, at least barring the kind of market imperfections that the Supreme Court has held could give rise to separate "aftermarkets,"¹¹ the conclusion that Data General's copyright gave it market power over the OEMs ignored the fact that Data General may well have had to compete hard for the OEMs' allegiance at the very outset.

The strength of Justice O'Connor's concurring opinion in Jefferson Parish and the weakness of the Digidyne analysis make it unsurprising that this Ninth Circuit opinion has been the lone decision since Jefferson Parish upholding the rule of Loew's. Rather, one Circuit Court of Appeals after another has rejected the idea that the mere existence of an intellectual property right alone could give rise to a market-power presumption.¹² This reflects, I think, the wisdom of allowing the Sherman

¹¹ Eastman Kodak Co. v. Image Technology Services, Inc., 504 U.S. 451 (1992).

¹² E.g., American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1367 (Fed. Cir.) ("patent rights are not legal monopolies in the antitrust sense of that word"), cert. denied, 469 U.S. 821 (1984); A.I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673, 676 (6th Cir. 1986); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 673 n.4 (7th Cir. 1985), cert. denied, 475 U.S. 1129 (1986); Nobel Scientific Indus. v. Beckman Instruments, 670 F.Supp. 1313, 1329 (quoting Jefferson Parish, 466 U.S. at 37 n.7 [O'Connor, J., concurring]), aff'd, 831 F.2d 537 (4th Cir. 1987); see also SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203 (2d Cir. 1981) ("When the patented product, as is often the case, represents merely one of many products that effectively compete in a given product market, few antitrust problems arise"), cert. denied, 455 U.S. 1016 (1982).

Act to evolve through case law, in which repeated exposure to real-world market situations and developments in economic thinking give judges and advocates the chance to apply the law's general mandates with flexibility and circumspection.

In addition to case law, the vast majority of antitrust scholars and commentators have for many years concluded that the mere existence of a patent, copyright, or trade secret does not necessarily confer market power upon its owner. That is because of the inescapable logic that even different products may, and in many circumstances do, compete with one another to a sufficient extent that even having an exclusive right with respect to an individual product does not allow the seller of that product to profitably maintain prices above, or output below, competitive levels for a significant period of time.

To clarify how the federal antitrust agencies enforce the law with respect to this question, the DOJ/FTC Intellectual Property Guidelines of 1995 state that "[t]he Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner." Our reasoning was that "[a]lthough the intellectual property right confers the power to exclude with respect to the *specific* product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power."

The virtual unanimity of scholars on this point, the analysis

contained in the DOJ/FTC Intellectual Property Guidelines, and the inexorable development and maturation of court decisions in this area of antitrust law, which all resolve the issue in accordance with the substance of this legislation, bring into question whether legislative action is really necessary at this point. One of the great virtues of the antitrust laws is that they are general in nature. Adopting new antitrust legislation should be done only when the need for such legislation is great.

It is also worth noting, I think, that the development of antitrust thinking leading to the current approach by courts, scholars and the federal antitrust agencies, could not have happened had, for instance, the antitrust wisdom of the 1960s and 1970s on intellectual property licensing -- which we now refer to without nostalgia as the "nine no-nos" -- been codified.

This brings me to one other point I want to emphasize in light of the prominence of the Antitrust Guidelines for the Licensing of Intellectual Property and the other federal agency antitrust guidelines that have recently issued.¹³ Mr. Chairman, you generously mentioned the IP Guidelines in your floor remarks introducing this legislation. My fear is that, if the current legislation sets a precedent for enacting parts of our guidelines into law, partisans of all sorts of theories may comb the various Guidelines for concepts they favor, and, discarding other portions

¹³ See, e.g., DOJ/FTC Antitrust Enforcement Guidelines for International Operations (1995); DOJ/FTC Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust (1994).

that give the Guidelines balance, urge the passage of what they like to become part of the law. This might lead the Division and the FTC to be reluctant to issue Guidelines, and I think we would all be much worse off if that occurred.

Conclusion

In sum, the Department supports the substance of H.R. 2674. It embodies an antitrust principle so firmly established that it poses no serious prospect of proving to have been improvident. The question for this Committee and for this Congress is whether given the current approaches courts are taking, there truly is a substantial and compelling justification for amending the nation's antitrust laws.

Mr. Chairman, this concludes my prepared statement. I would be very happy to address any questions you or the other members of the Committee may have.